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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 310

GLEN F. DASTUGUE,

Petitioner,

versus

AMERICAN OIL COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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May It Please the Court:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on April 29, 1963.

OPINIONS BELOW.

The text of the opinions of the Court of Appeals for the Fifth Circuit Court, however, is found in Appendix.

JURISDICTION.

The judgment of the Court of Appeals was entered on the 29th day of April, 1963. This Court has jurisdiction over this case and more specifically under Article 2315 of the Louisiana Revised Code.

QUESTIONS PRESENTED.

1. The case was presented to the district Court in its entirety, and after the overruling of a directed verdict the jury brought in a verdict for the plaintiff in the sum of $50,000. Upon appeal, the appellant alleged that the district judge had erred in charging the jury in regard to the earning power of the plaintiff.

2. The district judge had erred in allowing a parish ordinance which regulated the height of a pilot light in a panel ray heater to twenty-four inches from the floor.

STATEMENT OF THE CASE.

This is a civil action in which Glen F. Dastugue, plaintiff, being a Louisiana citizen, seeks to recover a money judgment from the defendant, American Oil Company, a foreign corporation authorized to do and doing business in the State of Louisiana, thereby allowing federal jurisdiction based upon diversity of citizenship.

On January 23, 1961, plaintiff was employed as a service station attendant by the lessee, Mr. Floyd J. Gremillion, operator of the service station on Jefferson Highway near Harahan, Louisiana, said lessee operating under a written lease from the defendant herein, the American Oil Company.

Plaintiff at approximately 7:15 P. M. on above-stated date was in the process of cleaning down the grease rack, cleaning room and the office section, all enclosed in one building of the service station in question.

The plaintiff used the only cleaning product available during the entire time he was employed at said station, gasoline, which was contained in a can in the grease rack. Plaintiff swept out the entire building and used the gasoline cleaner to clean the grease racks, cleaning room and office and, as he finished, he had to leave the station to service a vehicle and shortly after his return to the office the office was ignited by flames when the pilot light on a panel ray heater ignited the gasoline. The said panel ray heater pilot light was approximately 14 inches off the floor rather than the regulation 24 inches off the floor and the exhaust fan over the door to the entire office, installed and owned by the defendant, was inoperative at the time. Further, another large fan at the other entrance door to the office was inoperative at the time.

The jury trial resulted in a general verdict for the plaintiff for $50,000.00. Motions for judgment notwithstanding the verdict or for a new trial were denied. The defendant has perfected this appeal and the questions involved in the appeal are to be resolved by this Honorable Court.

Plaintiff carried the burden of proof beyond all preponderance of evidence that the defendant was negligent in having a ventilating fan for the purposes of ventilation that was inoperative and did not work and

that according to expert testimony would have prevented this terrible tragedy. In the testimony of Mr. Floyd J. Gremillion, the lessee of the station in question, this was pointed out.

"Q. Did you try to operate the fan, the ventilating fan which was located over the door way, going from the office to the grease rack?

A. No, sir. There was no blade on that fan.

Q. No blade on the fan?

A. That's right.

Q. So, then, even if the motor worked, the fan itself would not operate, is that correct?

A. That is right."

Plaintiff by all preponderance of evidence proved the location of this panel ray heater to be only about 12 to 14 inches from the floor, as pointed out in the testimony of Mr. Floyd J. Gremillion:

"BY MR. ALKEK:

Q. That heater that was in the service station at the time that you are talking about, that you took over the station, what type of heater was it?

A. It was a panel ray heater, the natural gas-type, with a pilot light.

Q. With a pilot light?

A. Right.

Q. Do you know where this pilot light was located?

A. Yes, sir.

Q. Where?

A. On the bottom of the heater, right near the burner.

Q. How high would you say that this pilot light was from the floor?

A. Approximately one foot.

Q. Approximately twelve inches or one foot?

A. Right."

In the testimony of Dr. Raymond V. Bailey, dean of the chemistry department at Tulane University, it was clearly brought out that if the exhaust fan would have been operative the chances of an explosion would have been reduced:

Q. Doctor, let's assume that the grease rack door and the wash shed door were closed, that these two doors here, that these two doors here were closed (indicating on exhibit) would this increase or decrease the possibility of ignition?

A. That would increase it because you would get some diffusion through the doors, if the doors were open, some dilution was there. There is a minimum quantity of vapor that you must have in the air before you get an explosive limit. For gasoline this is about one per cent by volume. For kerosene it is approximately 1.1—and I believe it is just a little higher for kerosene than it is of gasoline.

Now, with the door closed, the concentration of vapor that can build up a little more, and you will get some diffusion from the outside

if the doors are open, and it is less likely that you will build up an explosive concentration.

BY MR. ALKER:

Q. Now, Doctor, let's assume that the front door to the office and the grease rack and the wash rack doors are closed, would this increase or decrease the possibility of ignition?

A. This would increase it.

Q. Now, doctor, if you washed or cleaned the floors of the office with three substances, one being gas, and one being kerosene, and one mineral spirits, tell us individually, if you will, what the possibilities of ignition would be from this pilot light?

A. Would you repeat the question, please?

Q. I want to know, with all of the doors closed, and we have everything closed except this door, let's say, and I want to know if we cleaned this area (indicating on exhibit in the office down with, Number 1, gas, Number 2, mineral spirits, and Number 3, kerosene, or I guess it should be Number 1, gas, Number 2, kerosene, and Number 3, mineral spirits, what the possibility of ignition would be from the pilot light?

A. I would say that the possibility would be extremely high for gasoline. It would be much lower for kerosene and mineral spirits, because of their relative volatility or vaporization that we were talking about a moment ago, which, I would say, that the possibility for

kerosene and mineral spirits would exist, and specially if there were hot spots created in the vicinity of the heater by the radiant heat from the heater so that the temperature of the kerosene or mineral spirits in that vicinity were raised to a sufficient point to get a little more volatilization than might normally occur.

Q. In other words, this pilot light could ignite any of these inflammable fluids, is that right?

A. Yes, sir.

Q. Then, as I understand your testimony, it would decrease it somewhat if there were no fans blowing at all under those circumstances, blowing from the inside of the office into the grease rack, is that correct? If there is no fan blowing, there is more probability of an explosion than if the fan was blowing from inside of the office to the outside, into the grease rack, pulling air through the door, is that correct?

A. Yes."

Once again expert testimony by Dr. Raymond V. Bailey pointed out that the installation of this panel ray heater below the statutory height requirement had a great deal to do with this fire:

"Q. Do you consider the placement of this particular panel ray heater in this particular service station unsafe, if you feel qualified to answer that on the basis of the information which you have?

A. I would say that the existence of any flame at a low level would be unsafe. It would be unsafe at a higher level, but it would be more unsafe at a lower level."

Even in cross-examination of Dr. Bailey by counsel for defendant it was clearly shown the danger and negligence on the part of the defendant having this panel ray heater in the service station and particularly the negligence of the defendant having it below the statutory height:

"Q. Mr. Bailey, if you assume that there is gasoline in the gas pumps out in front of the station, some distance, and you assume that there is gasoline in one of those containers in the grease racks, and assume that the floor of the office in which the heater is located is literally soaked with gasoline, and is slippery to the feel and can be seen, is there any question in your mind about the source of the flammable material?

A. I am not sure that I am with you on the question that you are asking. You're telling me that there are three sources, one being evenly distributed over the floor, and on the grease rack, and then the other one in the gasoline pump? And now, what is your question?

Q. My question is if you assume those three locations, those three circumstances, and you assume this location of the heater in the office where the gasoline is on the floor, where, in your opinion, did the fumes come from which ignited?

A. If you're going to specify that case, then I would say that in all probability the fumes came from the floor in the office.

Q. Then, by all probabilities, you mean it is more probable in your opinion than not?

A. In this case, that is what I mean—it is more probable than not that those fumes, the fumes, would be from the floor.

Q. Well, can we put the question this way: If you rule out the possibility or the existence, if you rule out the existence of the gasoline pumps in the front, and you rule out the existence of any cans of gasoline, mineral spirits or kerosene in the grease rack—

A. Yes.

Q. ---- you assume the existence of the gas heater in the office, then I suppose you would not say that the heater is unsafe because there is gasoline on the floor, but rather that the gasoline on the floor is unsafe because there is a heater there, would you not?

A. Well, there is the problem of semantics—an unsafe condition exists due to the combination of the heater and the gasoline."

The chief building inspector for the Parish of Jefferson, Denis De Vun, Sr., closely read out the requirements under Article 1108, Section (A), of the Building Code and Related Regulations of the Parish of Jefferson, the regulations for installation of the panel ray heater in a building such as the service station involved:

"BY MR. ALKER:

Q. Mr. De Vun, I direct your attention to Article 1108, and what is the caption of that Article?

A. Article 1108, 'Special Hazards - - -'

Q. Would you read, please, Section 'A' of Article 1108 of the Building Code and Related Regulation of the Parish of Jefferson?

A. 'In any room in which volatile, flammable liquids are used or stored, no device generating a glow or flame capable of igniting gasoline vapors shall be installed or used within twenty-four inches of the floor.'"

It was clearly established that the sales representative and inspector for the defendant knew of the failure of the exhaust fan, but both of them refused or failed to correct the condition of said ventilating fan. This was brought out in the testimony of Mr. Hirman B. Barber, the former lessee of said station:

"Q. Did you ever ask Mr. Red Probst to repair that fan?

A. No, sir I never asked Mr. Red Probst.

Q. Who did you ask?

A. Henry Jackson.

Q. Who is that?

A. He was our sales representative out there at the time.

Q. And who is this 'our sales representative'?

A. American Oil Company.

Q. What did he tell you?
A. He told me that it wasn't part of the station equipment.

Q. So then he refused to repair it?
A. Well, they never did repair it."

It was clearly established through expert testimony even by experts called by the defendant, a regional engineer, James E. St. Germain, for the defendant stated the statutory requirements of a panel ray heater be twenty-four (24) inches from the floor, and not 12 or 14 inches from the floor such as the case of this panel ray heater:

"Q. I hand you this Building Code and Related Regulations of Jefferson Parish, and direct your attention to Article 1108, which is 'Special Hazards,' and ask if you are familiar with Section 'A —'? Would you read Section A, please?

A. 'General. Chimneys, heating apparatus and gas-fired furnaces shall conform to the requirements of Chapter 3752 and 53. In any room in which volatile, flammable liquids are used or stored, no device generating a glow or flame capable of igniting gasoline vapors shall be installed or used within twenty-four inches of the floor.'

Q. Where is this service station located?
A. In Jefferson Parish."

The fact that the ventilating fan was a property of the defendant was clearly established and was inoperative was clearly shown and was clearly pointed out by

the testimony of a Mr. Felicien Perrin, a mechanical engineer for the defendant:

"Q. When you offered your building plans to the Regulatory Inspection Board of Jefferson Parish, did these plans provide for three doors within the office? In other words, the front door, the side door going to the grease rack, and the door going out to the street by Rural Street?

A. Yes, they did.

Q. Did your company at any time ask for, request and secure, a permit from the Jefferson Parish Building Regulations Department, a permit to board up and close this door?

A. Not to my knowledge.

Q. Who has the fan to the ventilating—the ventilating fan, who has that now, Mr. Perrin?

A. I don't know. It was a property of the operator, and I presume that he removed it.

Q. I'm talking about the ventilating fan?

A. The ventilating fan? It is in the hands of an elecurician.

Q. Still in the hands of an electrician?

A. Yes, sir.

Q. A year and six months later?

A. Yes, sir.

Q. Sipce the time it has been removed?

A. Right.

Q. Is it a company electrician?

A. No, sir, it is an outside contractor."

Testimony of said expert witness under re-cross-examination brought out the plaintiff's position that it is a common practice and practice of the trade that necessarily open inflammables and fluids are kept in service stations:

"BY MR. ALKER:

Q. Did you or did you not testify that it was common practice of the trade to keep open receptacles of inflammable fluids in the grease rack?

A. I would like to qualify that - - -

Q. Just answer me yes or no, please - - -

A. Yes."

They established that it was a clear violation of the Jefferson Parish Building Code if the required 24 inches is not from the floor in the installation of any open flame heater. The said expert testimony under redirect examination is as follows:

"BY MR. MOSS:

Q. Mr. Perrin, this Section 1108 of the Building Code of Jefferson Parish which Counsel showed to you and which you read, did it contain anything which suggested to you that the installation on Jefferson Highway is improper or in violation of the Code?

A. No, it confirms that it is not in violation because the Section clearly states that flame or a glow would not be allowed in any room where

products are used or stored, and there is no common practice to store open containers of flammable liquids in a sales office."

It is clearly established by defendant's own witness herein that although he answered it was not a violation because flames or glow would not be allowed in any room where products were used or stored, it was clearly brought out by the same testimony of this same witness, in answer to the practice of the trade that a service station being a building of one section divided only by passageways between sections with no doors between grease racks, cleaning room, and office section, established along with all the other testimony that the installation of this open flame heater only [redacted] inches off the floor was a clear violation of the Building Code of the Parish of Jefferson on the part of the defendant.

Once again in the testimony of another expert by the defendant, a mechanical engineer, James M. Todd, stated that the defendant violated the requirements and regulations of the Jefferson Parish Building Code.

"Q. I hand you the Building Code and Related Regulations of Jefferson Parish, sir, and ask you if you are familiar with Article 1108, Section A, and would you please read the title in Section A for us?

A. 1108?

Q. Yes.

A. That is 'Special Hazards. (A) General. Chimneys, heating apparatus and gas-fired furnaces shall conform to the requirements of Chapter

3752 and 53. 'In any room in which volatile flammable liquids "are used or stored, no device generating a glow or flame capable of igniting gasoline vapors shall be installed or used within twenty-four inches of the floor."'

Q. Are you familiar with that regulation?
A. Yes, sir."

Plaintiff submits that there is no dispute with the case relied upon by defendant in its argument for a judgment for a matter of law, for in that case cited by Judge Hutcheson this Court ruled:

"* * * As decided by this Court in Brinson v. Illinois Central Ry. Co., 5 Cir., 241 F. (2d) 494, while negligence and contributory negligence are ordinarily issues for the jury, where there is no substantial conflict in the evidence and when, from undisputed and indisputable facts, reasonable men in the exercise of right reason and fair judgment could draw only one conclusion, the court may properly withdraw them from the jury."

The plaintiff agrees with this rule, but from all the testimonies through the transcript of this trial the preponderance of testimony substantiates the negligence on the part of the defendant and certainly does negate contributory negligence on the part of the plaintiff. Plaintiff could cite innumerable cases to substantiate plaintiff's position but feels it suffices to rely upon *Jacob Schubinger v. Interlake Steamship Company*, U. S. Court of Appeals, 7th Cir., Dec. 29, 1959, 273 So. (2d) 307:

"The district court did not err in denying the defendant's motion for directed verdict and for judgment notwithstanding the verdict because the verdict was based upon false testimony. A mere scintilla of evidence is not sufficient to submit a case to the jury, but here there was sufficient evidence to sustain the verdict and the issue depended upon the credibility and weight of the evidence. Thus, the trial court was justified in submitting the case to the jury. Gunning v. Cooley, 1929, 281 U. S. 90, 94, 50 S. Ct. 231, 74 L. Ed. 720. Neither the trial court nor the reviewing court can reweigh the evidence because the jury could have come to a different conclusion, or because the court believed a contrary verdict would be more reasonable. Tennant v. Peoria & P. U. R. Co., 1944, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520. 'Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.' Lavender v. Kurn, 1946, 327 U. S. 645, at page 653, 66 S. Ct. 740, at page 744, 90 L. Ed. 916. While these two cases were decided under Federal Employers' Liability Act 45 U. S. C. A. § 51 et seq. the same rules of law are applicable under the Jones Act. Ferguson v. Moore-McCormack Lines, 1957, 352 U. S. 521, 523, 77 S. Ct. 459, 1 L. Ed. 2d 515. The plaintiff's testimony was sufficient proof to take the case to the jury. There was conflicting evidence but it was a question for the jury to determine whether the accident occurred as plaintiff contended."

Plaintiff feels that there is hardly any conflict in this case, and it's a decision for the jury to decide. Plaintiff again relies for his position on the case of *Simon v. Texas & New Orleans Company*, Court of Appeal of Louisiana, 3rd Cir., Nov. 17, 1960, 124 So. (2d) 646. In *Simon v. Texas and New Orleans Railroad Company, supra*, the Court states as follows:

> "The jury's function is to find facts relating to negligence, contributory negligence, last clear chance and damages. In the case of Ross v. Sibley, 116 La. 789, 41 So. 93, 95, the Supreme Court stated:
>
> "'The question of negligence was one of fact, and we are not prepared to say that a verdict of the jury was erroneous.'
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> "See also Henwood v. Wallace, 5 Cir., 159 F. (2d) 263; Foreman v. Texas & N. O. R. Company, D. C., La., 1951, 97 F. Supp. 378; Missouri Pacific Railroad Company v. Saileau, 5 Cir., 1959, 265 F. (2d) 90."

That the jury's findings on contributory negligence should be undisturbed unless they have no basis in evidence has been recognized in *Aaron v. Martin*, La. App., 1936, 167 So. 106; *Illinois Central Railway Company v. Aucoin*, 5 Cir., 1952, 195 F. (2d) 983.

Plaintiff negated any contributory negligence or assumption of risk on his part in preponderance of evidence when the witness Floyd J. Gremillion testified that Mr. Dastugue was never told not to use any gasoline or petroleum products to clean down the station:

"Q. Did you ever instruct Mr. Dastugue to use gasoline or petroleum products to clean the station?

A. No, sir.

Q. Did you ever instruct him or tell him not to do so?

A. That, sir, I will be perfectly frank--I don't remember telling him specifically 'Do not use gas to mop the floor.' No, sir, I don't remember.

Q. Now, let me ask you about occasions during your tenure as lessee of the station when Mr. Probst was visiting the station. Do you remember any such occasion on which Mr. Probst discussed with you the use of petroleum products for cleaning pumps?

A. No, sir, I don't remember."

Further, it was clearly established that said lessee knew that the plaintiff used gasoline as it was a common practice of the trade as done in the case at hand:

"Q. Now, I don't want you to repeat your testimony, but there are two things that I want to get very clear to the jury; and, Number 1 is, I understood your testimony to be that you did not tell Mr. Dastugue not to clean down any part of the service station with inflammable fluids, and is that correct?

A. That is right.

Q. And, secondly, you knew that he cleaned down the service station or the grease rack with gasoline, is that correct?

A. That is right."

Once again, by testimony by Mr. Wayne Dahlman, a former employee of the lessee at said station, it was clearly established that the cleaning fluid, gasoline, was used to clean down the office, grease racks and cleaning room of the station in question:

"BY MR. ALKER:

Q. Will you state your name for the Jury and the Judge, please?

A. Wayne Joseph Dahlman.

Q. Mr. Dahlman, by whom are you employed?

A. By Trahan's Texaco.

Q. And how long have you been in the service station business?

A. Since I was about 11 years old.

Q. For whom did you work during the month of January, 1961?

A. For Dick Gremillion.

Q. Did you ever have an opportunity to clean his service station during that month?

A. Yes, I did.

Q. Did you have an opportunity to clean this service station prior to January 23, 1961?

A. I probably did, yes.

Q. What cleaning fluid did you use to clean that service station?

A. Gasoline."

Once again, in redirected examination of the witness that the former lessee, Mr. Probst, used gasoline and knew of the gasoline being used and accepted this as the only thorough way to clean grease spots on the floor:

"BY MR. ALKER:

Q. Mr. Dahlman, I ask you once again prior to January 23rd, 1961, did you clean down the service station, the Amoco Service Station, which was owned or leased by Mr. Gremillion in the 8900 block of Jefferson Highway?

A. Yes, sir.

Q. Did Mr. Gremillion know that you cleaned down the service station?

A. Yes, sir.

Q. Had Mr. Red Probst seen you clean down this service station?

A. Yes, sir.

Q. What solvent did you use to clean down the service station during the month of January, but prior to January 23rd, 1961?

A. Gasoline, mineral spirits."

Further testimony clearly established this practice:

"BY MR. ALKER:

Q. Who, if anyone, told you to mop down the service station with gas?

A. It is done everywhere. It is the practice of the trade - - -"

It was clearly established through plaintiff's testimony that he had only worked for Mr. Gremillion a very short time in the service station and was not familiar with the use of cleaning fluids:

"Q. In other words, prior to the accident, your total experience in a service station was roughly a couple or three months; is that correct?

A. About that."

It was further brought out by the plaintiff that the former lessee at the time of the tragedy was told to use gasoline for cleaning purposes:

"Q. Mr. Dastugue, will you please tell us what type of solvent you used to clean down the service station when you worked for Mr. Barber?

A. Gasoline and mineral spirits.

Q. Who told you to use these solvents?

A. Mr. Barber.

BY MR. ALKER:

Q. Whom, if anyone, told you to use these solvents?

A. Mr. Barber.

Q. Was there anyone else?

A. Well - - -

Q. Was there anyone else, and if there was, name who else was working with you for Mr. Barber?

A. It was John Simmons."

It was further brought out by plaintiff's testimony that the representative saw him use gasoline as cleaning fluids in the station:

"Q. Who saw you washing down the service station with these flammable fluids?

A. Red and Dick.

Q. Dick who?

A. Dick Gremillion and Red Probst.

Q. And Dick Gremillion is Mr. Floyd Gremillion, is that correct?

A. That is right."

It was further established in the testimony of a Gerald G. Migaud, a former employee of said service station, that gasoline was used as well as mineral spirits for cleaning purposes:

"Q. What solvents did you use to clean up with?

A. Well, most of the time, if they had mineral spirits, we used mineral spirits or coal oil, and if they didn't have that, we used sometimes gasoline.

Q. Anything else?

A. Well, usually, if we used mineral spirits or gas, or whatever we used to clean the floor, after we finished, well, we usually hosed it down."

Dr. Bailey in his testimony clearly showed the unsafe hazardous condition having an open flame burning in a service station:

"Q. Well, I will say in the general use, there are cans of inflammables as a rule in the service station, there is a general custom to have gasoline or kerosene or mineral spirits in open containers for the purpose of cleaning automotive parts, cleaning hands, or maybe cleaning grease racks and other things, and I would like to know what the possibilities would be or the probabilities would be of having an ignition with a permanent light, such as the pilot light in this heater, 24 hours a day, with these explosives in open containers around the service station?

A. I would certainly be forced to say that it would be a hazardous condition, unsafe condition, to have a flame going at all times. As far as the particular probability, I think in order to answer that, I would have to have a more specific case, and would have to know a little more precisely how these things were being handled.

Q. Well, let's assume the gasoline was kept where you see these circles right outside (indicating on exhibit), right outside the door, and let's assume that on a cold night they close these doors, what is the possibility or probability of ignition?

A. I would say there is a very good probability of ignition from a situation of that sort, in a closed room with a door open here for opportunity for fusion, where there is a light, a flame."

Plaintiff relies on the rule set up in *Simon v. Texas & New Orleans Railroad Company*, Court of Appeal of Louisiana, 3rd Cir., Nov. 17, 1960, 124 So. (2d) 646; *supra*, when the Court cites as follows:

> "The Jury's function is to find facts relating to negligence, contributory negligence, last clear chance and damages. In the case of Ross v. Sibley, 116 La. 789, 41 So. 93, 95, the Supreme Court stated:
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> "'The question of negligence was one of fact, and we are not prepared to say that a verdict of the jury was erroneous.'
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> "See also Henwood v. Wallace, 5 Cir., 159 F. (2d) 263; Foreman v. Texas & N. O. R. Company, D. C., La., 1951, 97 F. Supp. 378; Missouri-Pacific Railroad Company v. Soileau, 5 Cir., 1959, 265 F. (2d) 90."

That the jury's findings on contributory negligence should be undisturbed unless they have no basis in evidence has been recognized in *Aaron v. Martin*, La. App., 1936, 167 So. 106; *Illinois Central Railroad Company v. Austin*, 5 Cir., 1952, 195 F. (2d) 983; *Robinson v. Missouri-Pacific R. R. Company*, 165 So. 527; *Bergeron v. Greyhound Corp.*, 100 So. (2d) 923; *Robiowolski v. Holloway Gravel Co.*, 173 So. 474.

Plaintiff proved by submitting medical bills, approximately $4,344.75 past medical bills already incurred and approximately $2,255.50 clinical bills, and further it was brought out by the deposition of Dr. Duncan M. McKee that future medical bills would run approximately $10,000.00 over a period of four years.

"Q. Doctor, could you give us an approximation of about how long it would take in months or years to return Mr. Dastugue to as close to normal as could possibly be done—wait, let me finish that question—let me add this: Assuming that he has the operations as you would schedule them, if you would schedule one this month and another one in three months, and another one in six months, assuming that on your schedule he had received this work, and you were completed what you had estimated would be his maximum recovery, how long do you think it would take you to do so?

A. To bring him to the ultimate of what could be accomplished would take about three to four years.

Q. And roughly, what do you think the cost of that would be?

A. That's very difficult to say.

Q. Well, just approximately?

A. Oh, I would think $10,000.00 should cover it; and again, that's a gross estimate."

The above figures amount to $16,603.25 in medical bills alone. Plaintiff further showed through its medical deposition along with the testimony by Mr. and Mrs. Glen F. Dastugue and testimony of several witnesses that visited plaintiff, the tremendous amount of pain and suffering indulged by Mr. Dastugue and further from the testimony of said Dr. Duncan McKee the amount of pain and suffering still indulged and to be indulged by plaintiff over a period of four more long years.

The defendant contended that the jury may have had pity by the appearance of Mr. Dastugue, but certainly this could not be the case as evidence is the award of $50,000.00 in consideration of the medical bills in the amount of $33,396.75, taken also in consideration the amount of pain and suffering indulged in any burn case such as this.

The trial Court read the plaintiff's petition and the defendant cites only part of the claim as pointed out in plaintiff's petition:

> "The plaintiff, Glen F. Dastugue, makes a claim against the American Oil Company in the amount of $525,000.00, which include separate claims for: . . . loss of income, $250,000.00 . . ."

When in fact plaintiff's petition, that part spelling out plaintiff's alleged claims, was read in total by the trial judge as follows in allegation number 4.

As a result of the hereinabove described accident, complainant suffered the following injuries, to-wit:

(1) Third-degree burns over 68% of body	$ 50,000.00
(2) Total disability as result of burns on body	100,000.00
(3) Disfigurement to face	50,000.00
(4) Disfigurement to body	10,000.00
(5) Pain and suffering	50,000.00
(6) Specials:	
(a) Loss of income	250,000.00
(b) Medical costs	15,000.00
TOTAL	$525,000.00

It's plaintiff's position that through medical testimony and through the photographs it was clearly shown that plaintiff suffered disfigurement to the face, body and hands, and through medical testimony it is sufficient that not only did but still is suffering a great deal, all of which certainly would entitle plaintiff to the sum of $33,300.00 in question.

Further, it is obvious from the judgment of only $50,000.00 that no loss of earnings was considered whatsoever in the jury findings. The trial judge read the allegations hereinabove quoted, and further plaintiff asks to call the Court's attention to the following decision, which clearly states that future pain and suffering and future disability and future loss of wages **or future impairment of capacity to work** can be supported by expert medical proof. 289 F. (2d) 611; *Tracy v. Mass. Bonding & Insurance Company*, 1960, 159 A. (2d) 86; *Emerson v. Hicheses*, 1933, 163 A. 381; *Hooley v. Kantor*, 1933, 163 A. 628; *Ryder v. Vermont Last Block Co.*, 1917, 99 A. 773. Likewise of the case of *Duree v. State*, La. App., 96 So. (2d) 854, 863, in discussing damages, the following language was employed:

> "The award of damages for personal injury or death is of necessity somewhat arbitrary; loss of love, companionship, support (both spiritual and financial), understanding, and guidance of a good father and husband has no monetary equivalent. While the damages should be compensatory of the loss sustained, Article 2315, LSA-C. C., in cases such as the present, where the damage is certain but of uncertain pecuniary value, much discretion

must be left to the trier of fact,' Article 1934, Subd. 3, LSA-Civil Code, . . . Although awards so made may vary greatly with the facts of each case, likewise they should be made with some degree of uniformity with those made for similar losses . . ."

The defendant contends that the trial Court should not have read plaintiff's claims, and, therefore, it should be pointed out to the jury that this should **not** be decided by the jury, but obviously the jury did not consider any loss of earnings in this matter: further, defendant admits *Rule 51*, which clearly states:

> "No party may assign as error the giving or failure to give an instruction unless he objects thereto before the Jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection. Opportunity shall be given to make the objection out of the hearing of the Jury."

Defendant failed to make a timely objection, and it should further be pointed out that it was brought out in the examination that plaintiff had been working only for a short period of time since he had been honorably discharged from the armed service only a short time before the accident.

The defendant urges the case of *Dufrene v. Indemnity Insurance Co. of North America*, 303 F. (2d) 788, 790 (5th Cir. 1962), as a basis that the trial Court erred in allowing hypothetical questions to be asked by experts assured facts of evidence. In view of the fact that the

counsel for plaintiff tried this case and that the counsel for defendant represented the defendant in the said case, it seems almost impossible that the defendant would rely upon this case for its position, in view of the fact this Honorable Court affirmed judgment of the lower Court and that the U. S. Supreme Court refused writs. There is no doubt in the minds of the counsel for plaintiff that after the *Dufrene* case that hypothetical questions may be used as long as they do not effect the outcome of this case.

REASONS FOR GRANTING THE WRIT.

First, the opinion of the Court of Appeals for the Fifth Circuit is contrary to the facts and to the law in this matter for the following reasons:

The Court of Appeals for the Fifth Circuit held that the district judge should not have charged the jury in regard to the earnings of the plaintiff because there was no evidence of loss of earnings so that the jury would not be able to determine what loss of earnings were. This is completely incorrect because the deposition taken by the defendant which was offered and introduced into evidence clearly set forth the earning power of the plaintiff. In Doctor McKee's deposition taken by the plaintiff, it was clearly set forth and determined that the plaintiff would have to undergo operations for a period of four years, subsequent to the date of the trial in the district Court. The time lost was set out clearly in said deposition, read and explained to the jury, and it was quite clear to the jury the loss of time and the amount of expenses which the plaintiff would have as a result of this accident. The

charge by the district judge is clearly stated on pages 473 and 474 of the transcript, the first paragraph after discussing with the jury the extent of lost and future earnings injected the two words "if any," and this would be very clear to the jury that if there was an absence of proof as to any of the above-stated loss of earning power that they were not to decide upon it, and the charge further clearly states that they are to determine the amount of damages only in accordance with the evidence. It becomes quite apparent that the jury did not even consider loss of earnings in computing the damages because the terrific suffering this man sustained as the result of this injury would be in excess of $50,000.00, not even considering the fact that it was clearly pointed out to the jury that he would have medical expenses in excess of $16,000.00, as a bare minimum. This would leave only $34,000.00 for pain and suffering.

Assuming that the charge was erroneous which is argued above (we are positive that it is not), the defense counsel failed to object to the charge in accordance with Federal Rule No. 51. Therefore, whether the charge was erroneous or not is irrelevant because the charge was not objected to at the proper time. Had the charge been objected to at the proper time, the district judge, who incidentally was Judge Frank Ellis, who was trying his first jury case, and had nothing to use as a yardstick but the Federal Rules, would have had an opportunity to recall the jury and reinstruct the jury if the charge had been improper. This is the purpose of Rule 51, and, if this rule is going to be disregarded, then all other Federal Rules should be disregarded and the courtroom should then become a "free for all."

I would like to point out to this Honorable Court that this was a serviceman who had only been to work a few months after having served his country in the armed service, and it would have been very difficult to present a pattern of income by this man to the jury, and certainly reasonable earnings were made by this man which I do not believe that the Court of Appeals has the right to break open the skulls of the jury and look into the jury's minds and determine how they arrived at their judgment figure unless this judgment was a specific judgment, specifying so much for mental anguish, so much for pain and suffering, so much for loss of earnings, etc.

The second reason for granting writs involves the *Jefferson Parish Building Code, Article 1108, Sec. A*, which reads as follows:

> "Special Hazards. In any room in which volatile flammable liquids are used or stored, no device generating a glow or flame capable of igniting gasoline vapors shall be installed or used within 24 inches of the floor."

It is apparent that the Court of Appeals did not pay any attention whatsoever to the tremendous amount of testimony by engineers and people who were in the service station business for years, which is clearly pointed out in the transcript on many pages, but I will point out certain specific pages for this Honorable Court. Mr. Albert E. Probst testified on pages 353, 356, 357, 358 to the following facts: that while he was the supervisor for the American Oil Company and their representative, he did not at any time sell to or even have available to sell a detergent

to clean up the service station or any of its parts, other than gas, mineral spirits or kerosene. He further testified quite clearly that open receptacles for volatile fluids were kept in the lubritorium which it was only a matter of three or four feet from the open flame, and also admitted that he knew that the service station, inside and out, was cleaned down with volatile fluids because there were no other substances available to do otherwise. The three engineers who testified for the defendant, who, of course, were not chemical engineers, testified that it was a common practice to keep flammable liquids in the lubritorium, six or eight feet from the heater, and that volatile fluids such as antifreeze were kept inside the service station in the office where the flame was burning, and generally admitted, all three, that this was the custom of the trade, and that it was extremely hazardous to have a glowing flame in the service station under these conditions. The most prevalent testimony of Mr. St. Germain is found on page 389. Mr. Perrin's testimony is most prevalent on pages 402, 413 through 418. Mr. Todd's testimony on pages 429, 443 and 451 is very important to substantiate the fact that volatile fluids were in the area where this flame glowed, and was capable of igniting gasoline vapors in accordance with Article 108, Section A, of the Jefferson Parish Building Code. It is undisputed that the flame in this heater was from eight to possibly 12 inches high and no more, and everyone has admitted that this is a hazard.

Dr. Bailey, the dean of the Chemical School of Engineering at Tulane University, who was the only chemical engineer who testified at this trial, clearly stated that

the receptacles in the lubritorium could have easily been ignited by the vapor flowing into the office by the incorrect height of the pilot light in the panel ray heater in the office. Dr. Bailey clearly stated the location of the pilot light was so hazardous that had the wind been blowing in the direction of the office, the fumes could have very easily been ignited by the pilot light which was only a few feet from the front door, and could have created a tremendous hazard. Further, it is clearly established by two experienced service station people, one Mr. Wayne Dahlman, whose testimony on page 128 through page 131 clearly states that while he worked in this particular service station that all they used to clean the service station was volatile flammable fluids, and no detergents were ever provided or used, and that it was the custom of the trade to clean service stations, including the office, with such fluids. Mr. Gerald G. Migaud testified on page 292 of the transcript that it was the custom of the trade to clean the office and the rest of the service station with either gasoline, mineral spirits or kerosene, and Mr. Gremillion on page 87 stated that these fluids were kept right outside of the door going to the lubritorium, which is only a matter of three or four feet from such flame, and the rest of Mr. Gremillion's testimony also pointed out that these fluids were used in cleaning up the service station.

It is inconceivable that, after this tremendous amount of testimony where it was clearly shown that volatile, flammable liquids were used and stored within the office of the service station where the pilot light was lit, which is absolutely in contravention to the Code, which stated that these liquids were not to be used or stored and that no device generating a glow or flame capable of ignit-

ing gasoline vapors shall be installed or used within 24 inches of the floor of which it is clear that this device was quite capable of igniting gasoline vapors. As pointed out by Dr. Bailey's testimony that the mere vapor from the gasoline pumps could be ignited by this device, and further, that under certain conditions it was pointed out in the transcript that the doors on the washroom and grease rack were often closed and the gas fumes from the volatile, flammable fluids could have easily been ignited by this improperly placed pilot light.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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New Orleans, Louisiana,
Counsel for Petitioner, Glen F. Dastugue.

CERTIFICATE.

I hereby certify that a copy of the foregoing brief has been sent to Mr. Murphy Moss at Lemle & Kelleher in the National Bank of Commerce Building, New Orleans, Louisiana.

EDWARD C. ALKER,
Attorney for Appellant.

APPENDIX.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20087

AMERICAN OIL COMPANY,
Appellant,

versus

GLEN F. DASTUGUE,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

April 29, 1963

Before PHILLIPS*, CAMERON and WISDOM, Circuit Judges.

CAMERON, Circuit Judge: This is an appeal from a jury verdict and judgment against the lessor of a service station and in favor of an employee of the lessee-operator of the station. Appellee was burned in a fire allegedly

* Of the Tenth Circuit, sitting by designation.

caused by the negligent acts of appellant in its role of owner of the realty upon which the fire occurred.

When the accident occurred, appellee Dastugue had been employed for about four weeks by one Gremillion, the lessee-operator of the station. He had previously worked for Gremillion's predecessor lessee for about a week, and continued working at the station when Gremillion took over its operation. Appellee's claim against appellant American Oil Company is not based upon any sort of agency theory; American's alleged liability is based upon the charge that it was negligent in that an unsafe heater and a defective ventilating fan were provided in the office of the station.

Appellant was washing down the floor of the station office with gasoline when the fumes were ignited by the pilot light of a panel ray heater, the light being situated approximately twelve to fourteen inches from the floor. He was severely burned and the jury returned a verdict for $50,000.

Appellant moved for a directed verdict and judgment n.o.v. on the ground that, as a matter of law, no negligence on its part was shown; and, alternatively, that appellee was guilty of contributory negligence, also as a matter of law. Appellant argues that the court below was in error in refusing to grant the motions. In addition, appellant urges error inter alia in the court's instructing the jury that it might consider lost earnings as an element of damage, contending that no evidence of loss of earnings was introduced at the trial.

Appellee's theory of liability rests upon his charge that appellant negligently furnished a heater with the pilot light so near the floor as to be dangerous; and that it negligently failed to repair a ventilating fan which, if in good condition, would, under the circumstances relied on, have cleared the room of fumes to the extent that the fume volume would have remained below the danger point. It is undisputed that gasoline fumes settle, being heavier than air.

We cannot say, after a careful review of the record, that the court below was in error in refusing to grant a directed verdict or judgment n.o.v. on the proof before it; and it is not necessary, therefore, to detail the conflicting evidence from which the jury reached its decision. We do, however, reverse and remand for a new trial because of two errors committed by the court below: (1) its error in instructing the jury on the appellee's claim to loss of earnings when there was no proof of loss of earnings in the record, e.g., Greyhound Corporation v. Ault, 1956, 5 Cir., 238 F. (2d) 198; and (2) its manifest acceptance, as the chief basis of liability, of a Parish ordinance[1] which we think inapplicable to the case developed in the trial as revealed to us by the record. It is our opinion that this ordinance is not applicable under the facts of this case, since it is clear from the record that no "volatile, flammable liquids" were "used or stored" in the office of this

[1] Section A of Article 1108, Building Code and Related Regulations of Jefferson Parish:
"Special Hazards. In any room in which volatile flammable liquids are used or stored no device generating a glow or flame capable of igniting gasoline vapors shall be installed or used within twenty-four inches of the floor."

service station except the gasoline brought in by appellee. We think that, on another trial, this ordinance should not be before the court or jury, and that the question of negligence vel non should be tried under the general law of negligence in force in Louisiana.

REVERSED AND REMANDED for a new trial.